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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 221

MARTIN ROSS AND MILTON GECKER, *Petitioners*

v.

UNITED STATES OF AMERICA

No. 273

IRVING ROSS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 680-692) is reported at 197 F. 2d 660.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1952 (R. 679). Petitions for rehearing were denied on the application of petitioners Martin Ross and Gecker on June 26, 1952 (R. 697), and on the application of Irving Ross on July 17, 1952 (R. 704). The petition for a writ of certiorari in No. 221 was filed on July 22, 1952, and in No. 273 on August 14, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in denying the motions of petitioners Martin Ross and Gecker for a trial separate from petitioner Irving Ross on the ground that certain counts did not relate to them, where all three petitioners were jointly charged in a number of counts, including the conspiracy count.

2. Whether an acquittal on a conspiracy count precludes, on the theory of *res judicata*, a finding of guilt on substantive counts, where all counts of the indictment are disposed of in the same trial.

STATUTE AND RULES INVOLVED

12 U.S.C. [1940 ed.] 1731(a)[1] provides:

(a) Whoever, for the purpose of obtaining any loan or advance of credit from any per-

[1] Now codified at 18 U.S.C. [1948 rev.] 1010.

son, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of the said Administration under this chapter, makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income shall be punished by a fine of not more than $3,000 or by imprisonment for not more than two years, or both.

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> Two or more defendants may be charged in the same indictment or information if they

> are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

Petitioners were originally convicted under several counts of an indictment filed on July 9, 1948 (R. 1-10), charging them jointly with various violations of 12 U.S.C. 1731(a) (*supra*, pp. 2-3) and with conspiracy to violate that section. The convictions were reversed on appeal because of an erroneous jury instruction and because of the conduct of the prosecutor during the trial, and the case was remanded for a new trial. *Ross* v. *United States*, 180 F. 2d 160 (C.A. 6).

On the second trial all of the petitioners were acquitted on the conspiracy count. All were found

guilty on counts 2 and 11. Gecker and Martin Ross were convicted on count 4 and Gecker alone on count 6 (R. 17-20, 26-30, 680).[2] On appeal the Court of Appeals affirmed the judgments (R. 680-692).

The evidence for the Government may be summarized as follows:

The petitioners organized a partnership in September 1946 under the name of the Portsmouth Construction Company for the purpose of operating a "siding" and property improvement business in Portsmouth, Ohio (R. 355, 356, 388). Prior to the organization of the partnership, petitioner Irving Ross had arranged with the Universal C. I. T. Credit Corporation through its agent, A. P. Haberbush, for the financing of the partnership business by discounting the notes of its customers (R. 82). The Commercial Investment Trust, Inc. of New York City, the parent corporation of Universal C. I. T. Credit Corporation, had a blanket contract of insurance with the Federal Housing

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[2] Petitioner Irving Ross was sentenced to two years on each of counts 2 and 11 of the indictment to run consecutively, and in addition he was fined $3,000 for each count, making a total of $6,000 in fines (R. 26-27). Martin Ross received consecutive sentences of two years each on counts 2 and 4, a concurrent sentence of two years on count 11, and a fine of $3,000 for each of counts 2 and 4, for a total fine of $6,000 (R. 28-29). Gecker was sentenced to two years each on counts 2 and 4 to run consecutively, and two years each on counts 6 and 11 to run consecutively with each other but concurrently with the sentences on counts 2 and 4, in addition to a fine of $3,000 each for counts 2 and 4, for a total fine of $6,000 (R. 29-30).

Administration (Gov't Ex. 22, 23), and each of the home improvement loans of Universal C. I. T. Credit Corporation was insured by the Federal Housing Administration (R. 81, 301-307). At the time Irving Ross made arrangements with Universal C. I. T. Credit Corporation to discount the customers' notes, he completed a Federal Housing Administration Dealer's statement (Gov't Ex. 17) for the purpose of insurance by F. H. A. of the loans made for his customers through Universal C. I. T. Credit Corporation.

After the partnership was organized, petitioners operated in the following manner:

One of them would approach a home owner and would offer to re-side his home for no remuneration beyond the advertising benefits which would accrue (R. 93-94, 120, 131-133, 196-197, 218, 233-234). In fact, petitioners offered to pay some of these customers $25 per month to allow their houses to be used for demonstration purposes, and others $25 for each additional customer who copied the renovations. In some cases the customer was asked to return the $25 checks to petitioners as payment for the renovating work. (R. 101, 120, 139, 149, 166-167, 196-197, 203, 213, 219-220, 232-233, 239-240, 242, 251.) The home owner in each instance would be induced to sign a blank promissory note, and a blank F. H. A. credit application, which would be represented to him as a mere formality or, in some instances, as written permission

to go ahead with the work. None of the witnesses understood the nature of the papers they signed in blank. (R. 94, 96-103, 121-125, 128, 133-137, 163-166, 198-202, 215-216, 233-235, 254-255.)

The F. H. A. credit applications called for certain information relating to the salary and age of the applicant, the value of his home, and other data pertinent to the home owner's credit (see Gov't Ex. 1, 5, 8, 11, 14). The petitioners would fill in the credit information after obtaining the signature of the customer (R. 99, 122-123, 134, 159-161, 198, 234-235, 363-364). The Universal C. I. T. Credit Corporation relied on the data in the F. H. A. credit application in extending the loan, and also on information transmitted by telephone from the Portsmouth Construction Company (R. 293-296).

The promissory note would be filled in (R. 364) and endorsed by one of the petitioners, who acted as salesman, over to the Portsmouth Construction Company (Gov't. Ex. 2, 6, 9, 12, 15). It would then be forwarded through the Universal C. I. T. Credit Corporation to the Commercial Investment Trust, Inc. The latter corporation took the necessary steps to place the home improvement loans under F. H. A. insurance. (R. 82, 301-306; Gov't Ex. 24, 25, 26, 27, 28.) In each instance a check would be issued by the Universal C. I. T. Credit Corporation directly to the Portsmouth Construction Company, representing the amount of the home improvement loan (Gov't Ex. 18, 19, 20, 21).

In the case of witness Otto A. Smith, Jr. and his wife, their credit application (Gov't Ex. 5) misstates his age, employment and salary, and the purchase price of his home. Both Smith and his wife denied that they gave petitioner Irving Ross this credit data when he made up the form, but stated that it had been supplied without their knowledge. There was testimony substantiating the fact that they dealt with all three petitioners in this transaction, and that they were told that the re-siding of their home would be done free for advertising purposes. (R. 129-135, 152-163, 167-169.) Smith was in fact unemployed and at the time was receiving unemployment compensation, contrary to a statement in the application (R. 152). The Smith transaction forms the basis of count 2 (R. 7-8), on which all three petitioners were convicted.

In the case of witness Grant Smith, both he and his wife denied giving petitioners the credit data contained in their credit application (Gov't Ex. 1). They denied telling petitioners Gecker or Martin Ross that Smith made the salary stated in the application or that he owned the house for which he sought the loan (R. 91-96, 118, 126). Smith likewise testified that petitioner Gecker represented to him that the siding of the house in which he lived and which belonged to his mother-in-law, would be done free for advertising purposes (R. 93-94). Count 4, on which Martin Ross and Gecker were found guilty, was based on this transaction.

In the case of William H. and Lorena Delabar, William H. Delabar testified that the statements as to his salary and that of his daughter were falsified on his application (Gov't Ex. 11), as were the statements regarding his employment and the cost of his house. Delabar identified petitioner Gecker as the salesman in that transaction who came to his house and offered to put new siding on it free for demonstration purposes. (R. 231-240.) Gecker alone was found guilty on count 6, based on this transaction.

Similarly, in the case of Thomas and Veronica McManaway, those witnesses denied the truth of the information as to employment, salary, and cost of their house set out in their F. H. A. credit application (Gov't Ex. 8). Thomas McManaway also testified that petitioners represented that the work would be done free as an advertising project. (R. 194-200.) All three petitioners were found guilty on count 11, based on this transaction.

ARGUMENT

1. The chief contention of all three petitioners (Pet. No. 221, pp. 13-15; Pet. No. 273, pp. 6-8)—that under *Sealfon* v. *United States*, 332 U. S. 575, because the jury acquitted them on the conspiracy count, it could not properly find them guilty on the substantive counts—rests upon a misconception which has been consistently rejected by the courts of appeals since the *Sealfon* decison. *United States* v. *Rainone*, 192 F. 2d 860, 861 (C.A. 2); *United*

States v. *Bazzell,* 187 F. 2d 878, 884-885 (C.A. 7), certiorari denied, 342 U. S. 849, 889; *United States* v. *Coplon,* 185 F. 2d 629, 633 (C.A. 2), certiorari denied, 342 U. S. 920; *Robinson* v. *United States,* 175 F. 2d 4, 9-10 (C.A. 9), certiorari denied, 338 U. S. 832. The cited decisions, like the decision below, leave no doubt that petitioner's argument is erroneous and that it constitutes no ground for review by this Court. For the holding in *Sealfon*—that on the "particular facts" there presented (332 U. S. at 576), an acquittal of conspiracy precluded a *subsequent prosecution* for the substantative offense—in no way altered the rule that "when at the same trial a jury renders inconsistent verdicts of acquittal and conviction, the inconsistency is immaterial and the conviction will stand." L. Hand, C. J., in *United States* v. *Coplon, supra,* at 633, citing, *inter alia, Dunn* v. *United States,* 284 U. S. 390, 393.

It is settled, as this Court pointed out in *Sealfon* (332 U. S. at 578), "that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses" and that "with some exceptions, one may be prosecuted for both crimes." *Pinkerton* v. *United States,* 328 U. S. 640, 643. In this case, where the "separate and distinct offenses" were tried together before a single jury, there is no occasion to examine the facts and the instructions bearing on each offense (see

332 U. S. at 579) to determine whether an acquittal on one would have precluded conviction by a different jury on the other. Assuming, without conceding, that the jury's verdict is inconsistent as petitioners allege, the inconsistency affords no basis for concluding that the jury misrepresented its convictions when it found petitioners guilty on the substantive counts. *Dunn* v. *United States, supra,* at 393; see also *United States* v. *Dotterweich,* 320 U. S. 277, 279.

2. At the first trial, the convictions in which were reversed on appeal (*supra,* p. 4), petitioner Gecker had been acquitted on count 5 and petitioner Martin Ross had been acquitted on counts 5 and 6, while Irving Ross had been convicted on both of these counts. On this basis, Gecker and Martin Ross moved for separate trials, arguing that it would be prejudicial to try them jointly with Irving Ross where evidence would be offered on counts on which they had been acquitted (R. 11-14). The denial of this motion (R. 16) is assigned as error (Pet. No. 221, pp. 12-13).

It is clear, however, as the court below held, that there was no abuse of discretion in denying the motion. The conspiracy count and two substantive counts involving all three petitioners were still in the case, all three having been convicted thereon at the first trial. The general rule is that persons jointly indicted should be tried together (*Hall* v. *United States,* 168 F. 2d 161 (C.A. D.C.), certio-

rari denied, 334 U. S. 853, 335 U. S. 839), and Rule 8(b) of the Federal Rules of Criminal Procedure specifically provides that "such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." The jury was expressly instructed that only Irving Ross was on trial under count 5 (R. 521, 537, 548-549). There is no indication of prejudice in petitioners' statement (Pet. 12) that the jury "felt that they could find Martin Ross guilty on Count 5, and would no doubt have done so, but for the subsequent instructions given". Nor is there ground for review by this Court in the wholly speculative and undocumented suggestion (*ibid.*) that evidence admitted against Irving Ross on count 5 might have been considered by the jury to supply a possible deficiency in the evidence under another count.

3. While it is not included among the questions they present for review, petitioners in No. 221 argue (Pet. 15-16) that the trial court erred in refusing to give an instruction on the necessity for showing their knowledge of the falsity of the statements in the F. H. A. credit applications in order to establish the element of criminal intent. The record shows, however, that this instruction was given by the trial court and was reiterated several times during the course of the charge to the jury (R. 528-529, 532-533). And so the trial judge was correct when he pointed out to counsel for petition-

ers (R. 541-542) that the instruction they requested on this point had been fully covered in his charge. While petitioners were entitled to full instructions on all elements of the crime, they were not entitled to a repetition, in another verbal form, of instructions which had already been adequately and fairly covered. *Bennett* v. *United States,* 227 U. S. 333, 339; *Holt* v. *United States,* 218 U. S. 245, 253.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

CHARLES B. MURRAY,
Assistant Attorney General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

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